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No. 03-377

IN THE

SUPREME COURT OF THE UNITED STATES

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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25 pp

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MOTION TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Virginia Automobile Dealers Association ("VADA"), the Maryland New Car and Truck Dealers Association ("MNCTDA"), and the Washington Area New Automobile Dealers Association ("WANADA"), having not received consent from the Respondent, Bradley Nigh, respectfully move this Court for leave to file the *Brief of Amici Curiae in Support for Writ of Certiorari*, filed this day with the Court.

The United States Court of Appeals for the Fourth Circuit has altered and dramatically magnified the potential liability of a credit grantor under the Truth in Lending Act

("TILA"). The Amici Curiae have a substantial interest in this Court's review under a writ of certiorari. VADA is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. MNCTDA is an association of approximately 320 Maryland franchised new and used car and truck dealers. WANADA is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are especially interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through retail installment sale contracts covered by TILA. The question considered has a vital impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually, which are subject to TILA.

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October 14, 2003

QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act ("TILA") recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – despite the lack of any evidence of Congressional intent to effect such change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

IDENTIFICATION OF AMICI CURIAE

The Virginia Automobile Dealers Association ("VADA") is a trade association representing 585 franchised dealers of new and used automobiles throughout the Commonwealth of Virginia. The Maryland New Car and Truck Dealers Association ("MNCTDA") is an association of approximately 320 Maryland franchised new and used car and truck dealers. The Washington Area New Automobile Dealers Association ("WANADA") is a nonprofit trade association representing more than 200 franchised new and used vehicle dealers in the Washington metropolitan area which is comprised of the District of Columbia, Northern Virginia, and suburban Maryland. As a multi-jurisdictional association, WANADA shares many members with VADA and MNCTDA.

All three Associations were formed and maintained for the purposes, among others, of promoting the interests of franchised new and used car and truck dealers, encouraging sound business policies in the interest of the public, and fostering sound and constructive governmental legislation and regulation generally. All three Associations are vitally interested in this matter. Each of the hundreds of members of the Associations sell motor vehicles, a substantial portion of which are financed through Retail Installment Sale Contracts covered by the Truth in Lending Act ("TILA"). The question presented has a serious impact on the potential liability of these dealers and the hundreds of thousands of transactions in which they engage annually which are subject to TILA.[1]

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for Amici Curiae authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by Amici Curiae.

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit ("Court of Appeals") has altered and dramatically magnified the potential liability of a credit grantor under The Truth in Lending Act ("TILA"). TILA, as originally enacted 35 years ago, limited the statutory damages to which a creditor could be subjected to no less than $100 and no more than $1,000. The Court of Appeals in this matter interpreted subsequent amendments to TILA, which revealed no Congressional intention to change these limitations on statutory damages as, in fact, eliminating those limitations for financing transactions not secured by real estate. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119, 126-27 (4th Cir. 2003).[2]

The Court of Appeals' departure from settled law merits review by this Court, pursuant to a writ of certiorari, for the following reasons:

1. The decision of the Court of Appeals, if followed generally, has a potentially adverse impact on credit grantors who must, at substantial cost, radically increase protective safeguards against any conceivable error in TILA paperwork, increasing the cost of credit and even potentially leading to elimination of certain types of credit.

2. In reaching its decision, the Court of Appeals approved the granting of exemplary statutory damages so disproportionate to the actual injury that, if awarded in a civil

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[2] Consent to file this Amici Curiae brief was provided by Koons Buick Pontiac GMC, Inc. (hereinafter "Petitioner"), but not by Bradley Nigh (hereinafter "Respondent"). Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Amici Curiae have submitted to this Court, along with this brief, a Motion for Leave to File Brief *Amici Curiae*.

action they would be constitutionally infirm as a violation of due process.

3. The decision of the Court of Appeals, combined with earlier decisions severely limiting defenses under TILA, creates a statutory scheme of strict liability for oppressive exemplary damages for technical violations of TILA.

FACTS RELEVANT TO THIS BRIEF

The Respondent, Bradley Nigh, visited the dealership of the Petitioner on February 4, 2000 to purchase a vehicle. He chose a 1997 Chevrolet Blazer. He purchased it under a Retail Installment Sale Contract ("RISC 1") that provided for a $4,000 down payment and, in addition, the trade-in of a vehicle that he owned subject to a security interest with an estimated payoff balance of $7,500.[3]

Approximately three weeks later, the Respondent returned to the dealership in response to Petitioner's request, at which time Respondent was presented with another RISC ("RISC 2") that altered the terms and called for an additional $2,000 down payment. Respondent objected, but agreed to sign RISC 2 and to sign a promissory note for the additional down payment. Approximately one week later, Petitioner contacted Respondent, apparently through his brother, and requested that he again return to the dealership to sign a new RISC ("RISC 3"). Petitioner returned to the dealership on March 5. RISC 3 removed from the agreement the $965 charge for a "Silencer" security system listed on RISC 2 that

[3] This discussion of the facts is based upon the facts reported by the decisions in *Nigh v. Koons Buick Pontiac GMC Inc.*, 143 F. Supp.2d 535 (E.D. Va. 2001) and *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003).

had not been contracted for and had not been installed. Petitioner signed RISC 3.

Respondent filed suit against Petitioner as a result of the manner in which the sales transactions were conducted, and Petitioner filed counterclaims for the amounts owed on the promissory note and in excess of the original payoff estimate.

In April 2001, the United States District Court for the Eastern District of Virginia ruled on cross summary judgment motions filed by the parties. *Nigh,* 143 F. Supp.2d 535. Thereafter, the case went to trial.

The trial resulted in an award to Plaintiff under the Truth in Lending Act for $24,192.80 and under the Virginia Consumer Protection Act for $4,000. App. at 37a-38a.[4] Following the verdict, the Court awarded Plaintiff attorney's fees and costs of $26,129.10. App. at 53a.

Petitioner appealed the decision of the United States District Court for the Eastern District of Virginia to the United States Court of Appeals for the Fourth Circuit which affirmed the decision. *Nigh,* 319 F.3d at 129. A later request for *en banc* reconsideration was denied. App. at 55a-56a.

ARGUMENT

I. The Court of Appeals' Decision Has a Potentially Adverse Impact on Credit Grantors.

Billions of dollars in financing for motor vehicles annually may be affected by the decision of the Court of Appeals. In 2002 alone, nearly 17 million new cars and light-

[4] The Petitioner's Appendix in this matter will be referred to hereinafter as "App."

duty trucks were sold at retail in the United States.[5] In Virginia, 415,134 new vehicles were registered in 2002, and in Maryland 412,064 new vehicles were registered in 2002.[6] Annually, nearly twice as many used cars are sold.[7] A very high percentage of all sales are financed. The National Automobile Dealers Association ("NADA") estimates that 70% of new car sales are financed.[8] Consumer borrowing for vehicle purchases has dramatically increased in recent years. In 1989, $290.9 billion in consumer credit resulting from motor vehicle purchases was outstanding, and by 1998, this had increased to $451 billion.[9]

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[5] Between 1998 and 2002, nearly 70 million new cars and light-duty trucks were sold in the United States:

Year	New Vehicles Sold
1998	15,591,793
1999	16,954,924
2000	17,402,486
2001	17,177,789
2002	16,847,237

Automotive News 2003 Yearbook.

[6] *2003 NADA Data Book* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/2003/NADAData_2003.pdf.

[7] U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES 2002 1011 (2002) reports total vehicle purchases of 45 million vehicles annually. New car dealers alone sold 11.6 million used cars at retail in 2002. *2003 NADA Data Book, supra* note 6.

[8] National Automobile Dealers Association, *Financing Tips*, at http://www.nada.org/NADAGuides/Finance_Tips.htm.

[9] *2000 NADA Data Book* http://www.nada.org/Content/NavigationMenu/MediaCenter/NADAData/20000/NADAData_2000.pdf (on file with counsel for Amici Curiae VADA and MNCTDA).

The decision of the Court of Appeals can have a dramatic impact on the financing of sales of vehicles by dealers in Maryland and Virginia, in particular, and in the United States as a whole. Prior to this decision, dealers could sell and finance vehicles with the expectation that their potential liability would be limited. There was no serious dissent from the view that exemplary statutory damages for TILA violations were limited to a minimum of $100 and maximum of $1,000. These Associations will neither restate the statutory history, nor argue Congressional intent. Those subjects are fully explored in the Court of Appeals' decision and the accompanying dissent, and the Amici Curiae Associations expect that these will be fully argued by the parties in this matter.

Instead, these Associations wish to focus on the potential impact of this decision. The decision will allow exemplary statutory damages at double, and even triple digit multiples of the actual damage suffered by a borrower. This case provides such an example.[10] The "Silencer" included in RISC 2 that was removed from RISC 3 was a $965 item. The resulting verdict from application of the statutory damage formula without limit was $24,192.80. The application of the statutory damage formula in this case thus led to an award of exemplary damages 25 times the cost of the item that was improperly included in RISC 2 and not delivered with the vehicle.

Given that the exemplary damages are based on the amount of the finance charges and not upon the actual

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[10] In fact, the Respondent in this case suffered no actual damage at all because, under RISC 3, he never paid for the Silencer. As a result, the multiple of compensatory damages to actual damages in this case cannot even be quantified. To avoid a controversy as to whether there was even an injury arising from RISC 2, a question at issue in the case below, the Amici Curiae Associations will use, for the sake of argument, the cost of the Silencer as a basis for comparison to the statutory damages.

damages suffered by a borrower, the multiple of exemplary damages to compensatory damages could have been much higher. For example, had the dealer's noncompliance been inclusion of a $96 item instead of a $965 item, there would have been little impact on the overall finance charge, but the exemplary damages awarded would have been 250 times the actual damages based on the cost of the item.

As another example, in 2002, the average selling price of a new vehicle was $26,163.[11] Financed by an average buyer for five years at an 8% Annual Percentage Rate ("APR") with a 20% down payment, the amount financed would be $20,930, with total finance charges of $4,533. Statutory damages for a technical violation of TILA will be over $9,000, even though there may not be any compensatory damages at all as a result of the transaction described.

Clearly, a potential liability that is so disproportionate to the actual damages that may be suffered by a borrower will cause credit grantors, in this case car dealers and the finance institutions that accept assignment of RISCs entered into by car dealers, to be far more wary of the credit transactions in which they will participate. Creditors will have to consider steps to limit their liability if Congressionally enacted limits are not applicable. For car dealer credit grantors, additional processes will have to be adopted to prevent any conceivable error, since such an error can lead to exemplary damages of a higher multiple to actual injury than can be Constitutionally imposed for even the most heinous tortious activity. *See* Argument II, *infra*, at 9-11. These steps, and the likely addition of personnel required to ensure compliance, will increase the cost of lending which must be borne by consumers.

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[11] *2003 NADA Data Book*, *supra* note 6.

The additional liability may even force creditors to consider whether it is wise to do business with some classes of customers. For example, dealers may be forced to ask whether transacting business with individuals who have poor credit histories will be worth the cost. These consumers generally borrow at higher interest rates, thus raising the finance charges they are paying and raising the potential liability for dealers, in the event of a TILA violation, to a level far in excess of any return possible.

The potentially adverse impact of this decision on those who provide credit will be imposed in the absence of any evidence whatsoever that Congress intended to eliminate the statutory limitation applicable to finance contracts not secured by real estate. This lack of evidence of Congressional intent was the basis for the Court of Appeals decision:

> However, the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent.

Nigh, 319 F.3d at 128. To the Court of Appeals, where there was no other evidence of Congressional intent to change the statute, the intent necessary to construe the ambiguous statutory language must be gleaned strictly from the ambiguous language itself.

This decision, which depends on ambiguous statutory language to construe ambiguous statutory language, alters 35 years of creditors' understanding of their liability in the event of noncompliance with the TILA. TILA is a complex statute for which violations can be found irrespective of either the

credit grantor's intent or the true impact on the consumer. *See* Argument III, *infra*, at 12-13. This decision has an incalculable impact upon credit grantors, impacting the individuals to whom they may grant credit, the terms on which credit may be granted, the cost of putting procedures in place for granting credit, and other similar critical issues.

The Court of Appeals' answer to its process of using ambiguous language to construe ambiguous language is that Congress can pass a law to make clear that it never intended to change the law in the first place. However, if there is, in fact, no evidence that Congress had the intent to change the law in the first place, should it not be the duty of the courts to interpret laws in accordance with Congressional intent? It has long been held that the primary goal and rule of statutory construction is to determine the intent of Congress when considering ambiguous statutory language. *See U.S. v. N.E. Rosenbaum Truck Lines*, 315 U.S. 50 (1942); *see also Atlantic Mut. Ins. Co. v. C.I.R.*, 523 U.S. 382 (1998).

This Court should grant certiorari to review the Court of Appeals' decision, a decision which has the potential for substantial adverse impact on the credit system so critical to the economy of this country. Credit grantors should not be subjected to the possibility of exemplary damages when there are actual damages many times the actual injury to the borrower, unless there is clear Congressional intent that such a result was intended. Congress should not be burdened with passing a statute to clarify that it never wished to change the statute in the first place.

II. The Decision Approves Awards of Exemplary Statutory Damages That Are So Disproportionate to the Borrower's Actual Injury That They Would Be Constitutionally Infirm in a Common Law Case.

Under the decision of the Court of Appeals, statutory damage awards that are dozens and even hundreds of times the size of borrowers' actual injuries are a realistic possibility. This Court has repeatedly held that exemplary damages of the magnitude approved by the Court of Appeals, as compared to the actual injury in this case, are a violation of due process. Therefore this Court should grant certiorari to review this decision.

The exemplary damages in this case are 25 times the Respondent's compensatory damages. As already noted, if the "Silencer" system had been a $96 item instead of $965, the exemplary damages would have been 250 times the compensatory damages. If this were a common law case, such an award, judged by the guideposts approved in prior decisions of this Court, would be a violation of due process.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court considered a punitive damages award of $2,000,000 in favor of a purchaser of a motor vehicle which had prior undisclosed damage that reduced the value of the vehicle purchased by $4,000. This Court considered the relationship between that punitive damage award and the compensatory damages suffered in the fraud action filed against the manufacturer of the vehicle. *Gore*, 517 U.S. at 562-570.

In considering the relationship, this Court announced three guideposts to determine whether exemplary damages are disproportionate to the compensatory damages of the Claimant: (1) "the degree of reprehensibility of the

nondisclosure;" (2) "the disparity between the harm or potential harm . . . and [the] punitive damages award;" and (3) the difference between the remedy and "the civil penalties authorized or imposed in comparable cases." *Id.* at 575. This Court has reaffirmed these guideposts in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

If this were a common law tort case, the award of exemplary damages approved by the Court of Appeals would be found to be a violation of due process when judged by the three guideposts set forth in *Gore*.

Using the first guidepost of the *Gore* test, the statutory violation found in this case was not a reprehensible act. *See Campbell*, 123 S.Ct. at 1521 (outlining factors to consider when measuring the degree of reprehensibility). In signing RISC 2, the Respondent could have suffered an economic loss, but he did not because the Petitioner, finding the problem itself, had the Respondent return to its dealership to sign RISC 3 that removed the "Silencer" from the transaction. The action causing economic damages by Petitioner, which was voluntarily cured by the Petitioner, is hardly the basis for strong punitive sanctions.

Using the second guidepost of the *Gore* test, the exemplary statutory damages awarded in this case are clearly disproportionate to the potential economic loss. The Amici Curiae Associations agree that there is no bright line for determining the appropriate relationship between exemplary damages and compensatory damages; however, this Court has made clear that exemplary damages in the magnitude awarded here are clearly questionable:

> With regard to the second *Gore* guidepost, the Court has been reluctant to identify concrete constitutional limits on the ratio between harm or potential harm to the Plaintiff and the punitive damages assessed, <u>but in practice few awards exceeding a single digit ratio between punitive and compensatory damages will satisfy due process.</u>

Campbell, 123 S.Ct. at 1516 (emphasis added).

In removing the cap applicable to finance transactions not secured by real estate, the Court of Appeals has, in essence, approved a statutory scheme that allows an award of exemplary damages 25 times that of the economic injury in this case. This Court has repeatedly questioned whether such a huge exemplary damage multiple violates due process.

As to the third guidepost of the *Gore* test, one must look to civil penalties authorized or imposed in comparable cases. That is an odd guidepost to be applied when the case is itself about the remedies that the statute will allow. Nevertheless, had this been a Consumer Leasing Act case, the maximum statutory award would have been $1,000. Likewise, if this had been a case involving financing secured by real estate, the maximum award would have been $2,000.

Sanctioning a statutory scheme allowing exemplary damages that are such a large multiple of the compensatory damages, absent Congressional intent that this be allowed, justifies a full review under a writ of certiorari by this Court.

III. This Decision, Combined with Restrictions on the Bona Fide Error and Cure Defenses under TILA, Creates a Punitive Statutory Scheme of Strict Liability.

Prior court decisions have established TILA as a near strict liability statute, and the decision of the Court of Appeals will allow awards of substantial multiples of actual damages, even when, as here, actual damages are virtually nonexistent. When TILA was enacted, Congress provided two defenses for errors giving rise to potential liability. A creditor who discovers an error, notifies the obligor of the error, and takes action to cure the error will have no liability under the statute. 15 U.S.C. § 1640(b). Similarly, a creditor cannot be held liable for a bona fide error, provided it maintains procedures reasonably adapted to avoid such an error. 15 U.S.C. § 1640(c).

Over the years, the bona fide error defense has been significantly limited. Courts have limited the defense strictly to clerical errors. *See, e.g., Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982). Moreover, the requirement of evidence showing the establishment of procedures reasonably adapted to avoid any such error has limited the availability of the defense. *See, e.g., Hutchings v. Beneficial Finance Co. of*

Similarly, the defense of curative action under 15 U.S.C. § 1640(b) has been significantly limited. Courts have also limited this defense to clerical errors. *Thomka v. AZ Chevrolet, Inc.*, 619 F.2d 246, 251-52 (3rd Cir. 1980). Moreover, courts have required a certain formality in the notification of errors and the curative documents: "Without notifying the consumer that the May 27 documents contained errors and that the May 29 documents were curative, defendant cannot use § 1640(b) to avoid liability for violating

the [The Truth in Lending] Act." *James v. City Home Service, Inc.*, 712 F.2d 193, 195 (5th Cir. 1983).

Creditors are thus faced with the situation where they can have a technical problem in a TILA contract with no way to cure that problem through a new contract. These creditors will face statutory damage awards that can exceed even the selling price of the product without a way to cure the problem once the contract has been signed.

The decision of the Court of Appeals imposes an interpretation on the statutory scheme which is highly technical and punitive to creditors. Only certain types of errors may be considered clerical errors. Clerical errors will be excused only if there are procedures in place to avoid those errors. And, if there is a problem, simply undoing the problem through another contract is not enough. It must be an error to be cured, and the creditor must follow the formality of giving actual notification of the need to cure the problem and not just actually cure it. A decision allowing substantial exemplary damages in the absence of actual damages is unjustifiably punitive and should be reviewed by this Court.

CONCLUSION

For the reasons stated in the foregoing Brief of *Amici Curiae*, the Virginia Automobile Dealers Association, the Maryland New Car and Truck Dealers Association, and the Washington Area New Automobile Dealers Association request that this Court favorably consider the Petition for Writ of Certiorari by Koons Buick Pontiac GMC, Inc. and grant certiorari.

Respectfully submitted,

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October 14, 2003

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to File Brief *Amici Curiae* and Brief of *Amici Curiae* in Support of Petition for Writ Certiorari was served by first-class mail, postage prepaid on this 14th day of October 2003, in accordance with Rule 29.3 of the Rules of the Supreme Court of the United States, to the following:

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